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**HTH Corporation, Pacific Beach Corporation and Koa Management, LLC, a single employer, d/b/a Pacific Beach Hotel and International Longshore and Warehouse Union, Local 142**

**HTH Corporation d/b/a Pacific Beach Hotel and International Longshore and Warehouse Union, Local 142**

**Koa Management, LLC d/b/a Pacific Beach Hotel and International Longshore and Warehouse Union, Local 142**

**Pacific Beach Corporation d/b/a Pacific Beach Hotel and International Longshore and Warehouse Union, Local 142.** Cases 37–CA–7311, 37–CA–7334, 37–CA–7422, 37–CA–7448, 37–CA–7458, 37–CA–7470, 37–CA–7472, 37–CA–7473, 37–CA–7476, 37–CA–7478, 37–CA–7482, 37–CA–7484, 37–CA–7488, 37–CA–7537, 37–CA–7550, and 37–CA–7587

December 31, 2011

#### SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER  
AND HAYES

On June 14, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding,<sup>1</sup> finding that the Respondents committed numerous violations of Section 8(a)(1), (3), and (5) of the Act. One of these findings was that the Respondents violated Section 8(a)(5) and (1) by unilaterally closing the Shogun Restaurant at the Pacific Beach Hotel and laying off the restaurant employees. The Board severed and remanded the issue of whether a remedy was appropriate for the unilateral closing and layoffs of the Shogun employees.

On October 14, 2011, Administrative Law Judge Mary Miller Cracraft<sup>2</sup> issued the attached supplemental decision. The Charging Party filed exceptions, a supporting brief, and a reply brief. The Respondents filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions.<sup>3</sup>

<sup>1</sup> 356 NLRB No. 182.

<sup>2</sup> Administrative Law Judge James M. Kennedy, who heard and issued a decision in the underlying case, retired prior to the Board's remand.

<sup>3</sup> Member Hayes adheres to his position in the underlying decision that the Board should dismiss the alleged 8(a)(5) and (1) violation

#### ORDER

IT IS ORDERED that no additional remedy is warranted in this proceeding.

Dated, Washington, D.C. December 31, 2011

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Mark Gaston Pearce, Chairman

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Craig Becker, Member

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Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
SUPPLEMENTAL DECISION ON REMAND

In HTH Corp., 356 NLRB No. 182 (2011), the Board remanded the issue of whether a make-whole remedy is appropriate for "Respondents' unilateral closure of the Shogun Restaurant and the layoff of the employees. . . ." Having fully considered the entire record as a whole, as well as the parties' briefs, I find that a make-whole remedy is not warranted under the circumstances of this case.<sup>2</sup>

On September 7, 2011, all parties filed briefs regarding the necessity for opening the record to address the issue remanded by the Board. I find that it is unnecessary to reopen the record because no additional facts need be elicited in order to decide the issue on remand.

Initially, I note that the amended consolidated complaint, as conformed, does not allege unilateral closure of Shogun Restaurant nor does it allege unlawful layoff of the Shogun Restaurant employees. Moreover, no underlying unfair labor practice charge was filed alleging failure to give the Union notice and an opportunity to bargain about the decision to close the restaurant.<sup>3</sup> At the conclusion of the underlying trial, counsel for the Acting General Counsel stated that there was no allegation that the Shogun employees were entitled to a remedy. Thus, on the final day of hearing, counsel stated:

premiered on the closure of the Shogun Restaurant "[b]ecause the General Counsel did not include this charge in the complaint, and because he affirmatively stated at the hearing that he was not seeking a remedy for . . . [the Shogun Restaurant] employees." See *HTH Corp.*, 356 NLRB No. 182, slip op. at 5 fn. 17 (2011). For these reasons, Member Hayes concurs with his colleagues that no additional remedy is warranted.

<sup>1</sup> 356 NLRB No. 182, slip op. at 4–5.

<sup>2</sup> The underlying case was heard by Administrative Law Judge James M. Kennedy. At the time of this remand, Judge Kennedy had retired. By a correction dated July 11, 2011, the Board remanded this issue to the Chief Administrative Law Judge who designated me to decide the issue on remand.

<sup>3</sup> A charge filed alleging failure to bargain over the effects of the decision to close the restaurant was withdrawn.

Ms. YASHIKI: With regard to Respondent's Exhibit 18, Counsel for the General Counsel would like to state for the record that the Respondent's Exhibit 18 represents those individuals we believe are entitled to some form of remedy because they were not re-hired, with the exception of individuals Number 23 through 32 on this list.

JUDGE KENNEDY: That is because?

Ms. YASHIKI: And that is because we did not allege that the Shogun employees were entitled to remedy. Number 33—although Number 33 is listed as a Shogun Kitchen Department employee, his position is as a steward. And it is our understanding that Mr. Danilo Cortez, D-A-N-I-L-O, C-O-R-T-E-Z, is more akin to a steward rather than assigned to the Shogun Restaurant; and therefore, we believe that Mr. Cortez is entitled to remedy. And that's the reason why we are representing that numbers 23 -- individuals numbered 23 through 32 on this list are not entitled to remedy.

JUDGE KENNEDY: I see. All right.

The record reflects that these statements were made in the presence of Union Counsel Danny J. Vasconcellos, who represented the Union throughout these proceedings. Vasconcellos made no statement at all, either in agreement or disagreement, regarding counsel for the Acting General Counsel's statement that no remedy was sought for individuals affected by closure of the Shogun Restaurant. Further, at no time during the hearing did the Union assert that a remedy was requested for closure of the Shogun Restaurant.

In his decision, issued September 30, 2009, Judge Kennedy found that

On December 1, 2007, Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and released an undetermined number of employees who worked in that restaurant, in violation of Section 8(a)(5) and (1) of the Act.<sup>4</sup>

Judge Kennedy did not provide a remedy for this finding of unilateral closure. No party filed exceptions to this conclusion of law. Moreover, in its brief on cross-exceptions to the ALJ Decision, counsel for the Acting General Counsel did not seek a remedy for closure of the Shogun Restaurant. Because no remedy was provided in Judge Kennedy's decision, it was unnecessary for Respondents to except to the conclusion of law. Nevertheless, the Union excepted to lack of a remedy for the finding that Respondents unilaterally closed the Shogun Restaurant. This was the first indication that anyone sought a remedy for the closure. Thereafter, Respondents noted in their answering brief to the Union's exception to the Board that they objected to any remedy for the closure of the Shogun Restaurant because on the final day of hearing counsel for the Acting General Counsel stated she was not seeking a remedy for these employees.

Thus in the absence of exceptions to Judge Kennedy's conclusion of law (above), the Board entered the following Amended Conclusion of Law:<sup>5</sup>

6. By engaging in the following conduct, the Respondents committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act. . . . (g) On December 1, 2007, the Respondents unilaterally and without bargaining with the Union closed the Shogun Restaurant and discharged an undetermined number of employees who worked in that restaurant.

On remand of the remedy issue, counsel for the Acting General Counsel explained that it did not intend to litigate a violation concerning the closure of the Shogun Restaurant because no charge was filed regarding failure to give the Union notice and an opportunity to bargain over the decision to close the Shogun Restaurant. Counsel further notes that the decision to close the restaurant was not alleged in the amended consolidated complaint as a mandatory subject of bargaining. Due to these circumstances, at the end of the hearing counsel stated that there was no allegation that the Shogun employees were entitled to a remedy. Finally, counsel explains that the closure of the Shogun Restaurant was covered in testimony at the hearing only to the extent that it demonstrated that Respondents continued to be the employer of the employees even while PBH Management, LLC managed the hotel. My review of the pleadings and transcript indicates they are consistent with these assertions.

Respondents note on remand that the complaint did not allege any unfair labor practices regarding the former Shogun employees and the Union did not make a request for remedies for the Shogun employees until after the administrative law judge issued his decision and in spite of the fact that the Union did not object to counsel for the Acting General Counsel's disclaimer of remedies at the hearing or in its posthearing brief to the judge. Relying on *Sumo Airlines*, 317 NLRB 383 (1995), Respondents argue that a remedy is not permissible under principles of due process because no notice was given: not only did the complaint not allege a violation but additionally the Acting General Counsel never argued such a violation. In fact, Respondents argue, because the Acting General Counsel disclaimed any remedy, imposition of a remedy is precluded. Respondents rely on *Holder Construction Co.*, 327 NLRB 326, 326 fn. 1 (1998) (Board declined to exercise its broad remedial authority to find remedy where General Counsel affirmatively disclaimed any intent to seek reinstatement for discriminatee, whose counsel remained silent regarding disclaimer at hearing and did not except to judge's failure to include a reinstatement remedy).

The Union characterizes the Board's conclusion of law as the "law of the case." Thus, the Union argues that the starting point for analysis on remand is that Respondents violated the Act by unilaterally closing the Shogun Restaurant and discharging employees who worked in the restaurant. The lack of a complaint allegation and disavowal of a remedy are therefore irrelevant at this point. That being the case, the Union argues that a remedy is warranted. The Union distinguishes *Holder Construction Co.*, 327 NLRB 304 (1998), asserting that a remedy is warranted because, unlike the discriminatees, it in fact filed exceptions to the failure to award a remedy.

However, in my view *Holder* is not distinguishable. First, in

<sup>4</sup> 356 NLRB at 37, Conclusion of Law 15.

<sup>5</sup> 356 NLRB at 5.

*Holder*, counsel for the General Counsel affirmatively disclaimed any intent to seek the typical reinstatement remedy for the two discriminatees. Neither discriminatee nor their counsel disagreed. The same is true here. Counsel for the Acting General Counsel affirmatively disclaimed any remedy for the Shogun Restaurant employees. Counsel for the Union did not disagree. Second, in *Holder*, no exceptions were filed to the judge's finding that two employees were discharged for their protected, concerted activity. The same is true here. No party excepted to the judge's unfair labor practice finding. I find that because no remedy was set out in the underlying decision, it is reasonable that Respondents did not file an exception to Judge Kennedy's conclusion of law. Finally, in *Holder*, the General Counsel, after affirmatively disclaiming a remedy during the trial, took exception to lack of a reinstatement remedy. Here, the Union, after acquiescing to the disclaimer of a remedy at hearing, took exception to the Board for lack of a remedy for closure.

In my view, there is no discernable difference between the General Counsel taking exception to lack of a remedy in *Holder* and the Union taking exception to lack of a remedy here. In either case, the appearance is that a party who agreed at hearing that a remedy was not being sought, simply changed its

mind before the reviewing forum and requested a second bite of the litigation apple. However, it is clear that the parties knowingly proceeded throughout a lengthy trial without any allegation regarding the Shogun Restaurant closure. There was no viable unfair labor practice charge regarding the closure and at no time during the hearing did the Union urge a remedy for the closure. It was purposefully not litigated. The Board's broad remedial authority should not, in my view, extend in these circumstances. Thus, based upon *Holder*, I find that the circumstances do not warrant the exercise of the Board's broad remedial authority.

#### CONCLUSION OF LAW<sup>6</sup>

A make-whole remedy is inappropriate under the particular circumstances here.

Dated: Washington, D.C. October 14, 2011

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<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings and conclusions shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.